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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI**

DIVISION PRO TEM B

HON. WARREN R. DARROW

By: Diane Troxell, Judicial Assistant

CASE NUMBER: P1300CR201001325

Date: April 5, 2011

TITLE:

COUNSEL:

STATE OF ARIZONA

Jeffrey G. Paupore, Esq.
Deputy Yavapai County Attorneys

(Plaintiff)

(For Plaintiff)

vs.

STEVEN CARROLL DEMOCKER

Craig K. Williams, Esq.
DeRienzo & Williams
3681 N. Robert Rd.
Prescott Valley, AZ 86314

Greg Parzych, Esq.
2340 W. Ray Road, Suite One
Chandler, AZ 85224

(Defendant)

(For Defendant)

UNDER ADVISEMENT RULING ON STATE'S NOTICE OF CHANGE OF JUDGE

The Court has considered the pleadings and the arguments of counsel. Two issues have been presented for determination by this Court as the judge who is the subject of the Notice under Rule 10.2 of the Arizona Rules of Criminal Procedure: (1) whether the notice was timely; and (2) whether, pursuant to Rule 10.4, the State has waived its right under Rule 10.2 by having participated in "any contested matter in the case."

(1) Technical timeliness of notice.

The Court concludes that both the notice and the objection are timely in a technical sense. The Court accepts the avowal of defense counsel that the notice, which was filed on December 16, 2010, had not been received by December 30, 2010, the day on which the Defendant's objection to the notice was filed. The Court notes, however, that its "Order Reassigning Matter" filed December 17, 2010, reflects service on the Yavapai County Attorney and Craig A. Williams. The order dismissing the original cause, P1300CR20081339, was also filed on December 17 and reflects service on Mr. Williams and Mr. Greg Parzych. This order also mentioned Rule 10.6. The present case,

P1300CR201001325, was first assigned to this judge on December 10, 2010; thus the December 16 notice was timely, as was the Defendant's objection that was filed and served on December 30, 2010.

Defendant DeMocker's primary argument with regard to timeliness actually relates to the subject of waiver under Rule 10.4(a).

(2) Waiver under Rule 10.4(a).

The Court's action in dismissing cause number P1300CR20081339 without prejudice on December 16, 2010, brings into focus the fundamental issue under consideration here. If, in fact, the new indictment and cause number constitute a separate action, this Court's expressed concern with compliance with Rule 10.6 in dismissing the original cause was a legal non sequitur. In dismissing the older cause, the Court believed it was simply following the agreement of the parties that the original case would be dismissed without prejudice in light of the new indictment combining the original case with additional, related charges concerning the insurance proceeds and the "anonymous" email. This action dismissing an older matter that the parties agreed should be dismissed would not implicate the prohibitions contained in Rule 10.6, which limit the noticed judge's actions in the **new matter** to ministerial acts. In substance, however, as reflected in the Court's concern with the need to comply with Rule 10.6, a dismissal of the original case could have an impact on the due process rights or other interests of the Defendant in the new cause. Although the Defendant did not object to the dismissal of P1300CR20081339 by filing a pleading in that cause, he did, through his objection to the notice of change of judge in P1300CR201001325, articulate the specific manner in which his rights might be affected by the order dismissing the original indictment.

As the Court was suggesting at the close of oral argument on March 7, 2011, the issue under consideration would be in a different procedural posture if the Court had not issued the order dismissing the original cause. There would have been two pending indictments, and a Court would have had to consider the timeliness of the notice of change of judge (as it relates to waiver under Rule 10.4(a)) in the context of the potential impact of the dismissal of the original indictment on the Defendant's constitutional right to due process. As noted by the defense, by filing a new indictment that included the original charges, arguably the State was in effect securing a second notice of change of judge and thereby obtaining a de facto reconsideration of numerous previously litigated issues that had arisen in the course of a lengthy trial. Although the Defendant has not challenged in the original cause the Court's order dismissing the indictment, he has preserved through the pleadings filed in this cause the issue of the appropriateness of that order of dismissal.

Godoy v. Hantman, 205 Ariz. 104, 67 P.3d 700 (2003) does not determine the issue in the present case. In *Godoy* the Arizona Supreme Court observed that

[w]e have considered the effect of the issuance of a new indictment in other contexts. Arizona courts consistently hold that time limits for purposes of the right to speedy trial begin to run anew when a grand jury reindicts **following the dismissal of an earlier action against the defendant**. . . . We see no reason to treat time limits for filing a notice of change of judge differently.

Id., 205 Ariz. at 106, 67 P.3d at 702 (emphasis added). In the case under consideration the earlier action was not dismissed prior to the filing of the new indictment, and this Court concludes that it acted improperly by dismissing the earlier action before the Defendant was afforded an opportunity to object to that dismissal. This Court was mistaken in its assumption that the Defendant had no objection to a dismissal of the earlier action, and the Defendant should have been provided an opportunity to object. Therefore, consistent with Rule 60(c) of the Arizona Rules of Civil Procedure, this Court vacates its order of dismissal in P1300CR20081339. See *State v. Brooks*, 161 Ariz. 177, 179-80, 777 P.2d 675, 677-78 (App.1989). An order vacating the order of dismissal will be entered in P1300CR20081339.

Although the case deals specifically with Rule 42(f)(1)(D) of the Arizona Rules of Civil Procedure, the policy behind the waiver principle of Rule 10.4 of the Arizona Rules of Criminal Procedure is set forth succinctly in *Williams v. Superior Court in and for the County of Maricopa*, 190 Ariz. 80, 945 P.2d 391 (App.1997) as follows:

The waiver provisions of Rule 42(f) are intended to prohibit a party from peremptorily challenging a judge after discovering the judge's viewpoint on any significant aspect of the case. See *Taliaferro*, 186 Ariz. at 222, 921 P.2d at 22 ("The purpose of the waiver rule is to prevent the parties from testing the waters and then filing a [N]otice.").

Id., 190 Ariz. at 82, 945 P.2d at 393 (citation, quotation, and alteration in original). Disregarding the technical fact of separate cause numbers (of which there are again two) and looking at substance, there is no doubt that the parties have participated extensively in contested matters before this judge. There are both the overarching contested matter of the weeks-long jury trial up to the point of mistrial and the numerous contested evidentiary, disclosure, or other matters that the trial entailed. In his objection to the rule 10.2 Notice the Defendant refers to the decisions on these contested matters as constituting the "law of the case." Thus, looking at actual substantive issues, it would appear that the waiver provisions of Rule 10.4 would apply.

The matter is complicated, however, by the fact that the new indictment contains more charges than the ones alleged in the original indictment. Consequently, while the defense suggests that the State, having "tested the waters," is improperly attempting to obtain a second notice of change of judge, the State also has obtained probable cause determinations on charges that, if filed separately from the charges contained in the original indictment, would probably permit the State to file a notice of change of judge. In short, the State has a legitimate argument that it is entitled to file a notice of change of judge regarding the separate, albeit related, charges in the new indictment.

Furthermore, without going into matters that presently remain sealed or restricted, the Court notes the State's position that the mistrial was due solely to the conduct of the Defendant. If the Defendant caused the mistrial, one might argue, how can he object to the State's notice of change of judge as to a new indictment that includes allegations stemming from conduct first discovered during the trial? This Court concludes that this is not simply a case of a party "testing the waters" in a contested matter and then manipulating the system in order to obtain a change of judge.

Noting that the parties have not provided authority relating to the specific issue

presented here, this Court concludes that the matter should be determined by weighing the interests of the parties in light of the policy underlying Rule 10.4. Despite what would seem to be a delay in the filing of the objection to the Rule 10.2 notice, apparently the Defendant believes that, on balance, the rulings of this judge in the trial on the original indictment were favorable to his interests and are likely to remain in place for any second trial. It appears that circumstances surrounding the original rulings may have changed and that therefore these rulings may not stand regardless of what judge presides in the matter. But there certainly has been litigation of numerous contested matters in P1300CR20081339, an action that, in light of the Court's order vacating the dismissal, remains in effect.

The Defendant's interest in preserving the present judicial position on numerous rulings involving the original charges must be weighed against the State's Rule 10.2 right to have a different judge assigned to the new charges contained in the indictment in the present cause number. Even though changing the judge who has decided numerous contested matters may be merely an incidental, as opposed to intended, effect of the notice of change of judge, this Court concludes that the language of and purpose underlying Rule 10.4 does not permit this Court to recognize the Rule 10.2 Notice filed in the present matter. Acknowledging that there may be double jeopardy and collateral estoppel considerations not yet addressed by the parties, the Court notes that the State elected to join with the original charges new charges that could likely be prosecuted in separate actions in which the peremptory right to change the judge could not be successfully challenged. Although Rule 13.3(a)(2) and (3) may provide logical legal support for such joinder under the facts of this case, this Court determines that interests such as judicial economy and efficiency cannot supplant a Defendant's claimed interest in not losing, as a result of procedural choices that rest solely in the control of the State, what he perceives to be favorable judicial rulings in substantive, contested matters.

For the reasons set forth above,

IT IS ORDERED that the State's right under Rule 10.2 of the Arizona Rules of Criminal Procedure has been waived and that both cause number P1300CR20081339 and cause number P1300CR201001325 remain assigned to this judge.

DATED this 5th day of April, 2011.


Warren R. Darrow
Superior Court Judge

cc: Victim Services Division
Christopher B. DuPont, Esq., 245 W. Roosevelt, Suite A, Phoenix, AZ 85003
Chris Moeser, Esq., 201 E. Washington Street, Suite 1600, Phoenix, AZ 85004
Bill Williams, 824 W. Gurley Street, Prescott, AZ 86305
Hon. David L. Mackey, Division One